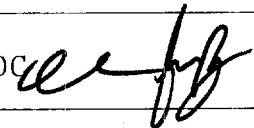


TO : Mr. Cary MILLER	DATE OF REQUEST	
FROM : MDC 	SUSPENSE DATE	
SUBJECT: Federal Tort Claims Act Amendments		
<p>NOTES</p> <p>Per your request please find attached some relevant documents on Tort Claims. I received (unofficial) word this morning that the Metzenbaum went through a surprise mark-up yesterday and has been forwarded to the full Judiciary for action tomorrow (Thursday).</p> <p>I am checking it out and will get back to you asap.</p> <p style="text-align: right;">MDC</p>		
COORDINATED WITH (list names as well as offices)		
NAME	OFFICE	DATE
NAME	OFFICE	DATE
NAME	OFFICE	DATE
NAME	OFFICE	DATE
ACTION REQUIRED BY GLC		

26 July 1978

NOTE FOR: LLM

FROM: MDC

SUBJECT: Federal Tort Claims Act Amendments

1. Attached for your perusal are the following items:
 - a. H.R. 9219
 - b. S. 2117
 - c. S. 3314
 - d. 13 March OGC letter on DOJ Amendments
 - e. 17 March OLC views letter
2. If you get a chance to review the attached you will be way ahead of me.



Assistant Legislative Counsel

STAT

NOTE FOR: LLM
FROM : MDC
SUBJECT : Federal Tort Claims Act Amendments

1. H.R. 9217 (House Version): The House version presents us with one major problem. The bill, which specifically provides for situations in which the United States will be substituted as a defendant in place of federal employee who is charged with tortious conduct committed within the scope of his employment or under the color of law, does not provide for any remedy (against the Government vice the individual employee tortfeasor) for torts that are committed overseas.

2. A potential plaintiff, therefore, could reasonably argue (under the House version) that, as the bill provided for specific instances in which the government would accept liability, those cases not provided for (e.g. torts committed overseas) are not covered and therefore the plaintiff's remedy is to seek redress against the individual.

3. Currently the judge, in such a situation, weighs the plaintiff's right to redress (and thus his need to be apprised of the identity of the offending employee) against the detriment to the National Security interest should the (undercover) employees name be released.

4. Although the House bill does not alter this procedure, the failure to specifically provide for coverage for overseas (Constitutional) torts makes for a presumably much stronger presumption in favor of the plaintiff's argument. I.E. had Congress intended to protect the identity of Federal employees working overseas they would have so provided in the bill. In each case, should the House version become law, the judge would have to carefully weight the plaintiff's rights versus our inevitable claim of privilege.

NOTE FOR: LLM
FROM : MDC
SUBJECT : Federal Tort Claims Act Amendments

1. S. 3314 (Senate Version): The Senate version of the bill presents us with several problems, more complicated than the House bill.

2. Various provisions in the Senate bill provide for cases whereby the USG will be substituted for an alleged tortfeasor federal employee in a suit for damages whereby the employee committed a tort against a U.S. citizen in the course of and scope of his official duties or under the color of U.S. law. The problem lies in the fact that all of these sections of the bill (Sec. 2679 (b) (1), (b)(2), (d)(1), (d)(2), exclude from coverage both presidential appointees and more importantly former federal employees.

The rationale is that since an Agency cannot take action against such persons they would not, in the twilight of their careers, be constrained from committing willy-nilly such torts and that therefore the only logical answer is to provide potential plaintiffs with the right of suit personally against the offending (retired) employee. The problems with this are obvious, as such an exception could only have a chilling effect on actions taken overseas. All employees would be well aware of the fact that anything they might do (unintentionally) which would violate constitutional rights would leave them subject to future litigation.

3. Another major problem area with the bill as now drafted involves section 7802 (b). This would allow a plaintiff to request (and be mandatorily granted) an Agency inquiry into the alleged tort of an employee merely after filing suit. (As you will recall, the purpose of the inquiry is to determine what if any administrative disciplinary action is to be taken against an employee by the Agency head because of that employee's tortious conduct which caused the government to be under the gun.) The obvious problem here is that it would allow for endless harassment (alla FOIA) of the Agency. All one would have to do in order to put into motion the inquisitorial process would be to file suit, regardless of the frivolity of the claim. Our position is that an inquiry should only be mandatory after a court has made a final determination or where an Agency settles a claim out of court in favor of the plaintiff.

4. A final problem with the bill is that it purports to bring into play certain sections of the Administrative Procedures Act. The Senate version calls for the President to set up a board (presumably (although not stated) the IOB) to oversee the rules and regulations drawn up by the Agencies which will govern the inquiries and hearings pursuant to the act. The problem is not in the IOB overseeing but rather in the fact that it is now unclear from the bill's language whether or not the IOB,

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assuming they would perform for us the oversight role, would be subject to the Admin. Proc. Act. If they were to be we would be required, by the relevant sections of that act, to hold hearings (public) as well as be subject to judicial review and all that that entails. Due to the short leash on this I am not on totally stable ground vis-a-vis the foregoing as it involves a great deal of legal research. I will get back to you on it.



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